

Service Date: December 16, 1985

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of MATADOR SERVICE, INC., Wichita,)	
KS for a Class C Certificate of)	DOCKET NO. T-8743
Public Convenience and Necessity.)	ORDER NO. 5629a

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ORDER DENYING RECONSIDERATION

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BACKGROUND

1. On March 19, 1985 Matador Service, Inc., 411 East 37th Street N., Wichita, Kansas 67220, filed an application with the Montana Public Service Commission. Applicant seeks a certificate of Public Convenience and Necessity, Class C, authorizing the transportation of asphalt, asphalt cements, cutback asphalts and emulsified asphalts between all points and places in the State of Montana for Koch Asphalt Company only.

2. Written protests were received from H.F. Johnson, Inc., Horno Transport, Inc., and Dixon Bros., Inc. Following receipt of protest and issuance of notice, a public hearing was held on July 17, 1985, at 2701 Prospect Avenue, Helena, Montana.

3. At the hearing, following the completion of the Matador Service Inc.'s case-in-chief, the Protestants moved to dismiss the application on the grounds that the Applicant had not sustained its burden of proving that public convenience and necessity required the granting of the application. This motion was renewed at the close of Protestant's case.

4. At the conclusion of the hearing briefs were ordered addressing the question of the difference, if any, of the burden of proving public convenience and necessity for contract and common carriers.

5. On September 19, 1985, this Commission issued Order No. 5629 denying Matador Service, Inc.'s application for a Class C authority. On October 22, 1985, after requesting and receiving an extension of time in which to file, Matador submitted a petition for reconsideration. The protestants, after requesting and receiving an extension of time in which to file, responded on December 5, 1985, with a brief in opposition to the petition for reconsideration.

ANALYSIS

6. In its brief at Page 1, Matador argues that Order No. 5629 is incorrect for the following reasons:

1. Order Number 5629 is in violation of MCA 69-12-312 and 69-12-313 inasmuch as it does not distinguish between the degree of proof required for a grant of operating authority to a Class B common carrier and a Class C contract carrier.

2. Order Number 5629 is in violation of Montana Law and Commission regulations inasmuch as it is not sufficient that the protesting carriers can provide a "reasonably adequate service" but it is necessary for the protesting carriers to prove that they can meet the "distinct needs" of the contract shipper. Thus, the order is in error in imposing the obligation upon the applicant to demonstrate that the

protesting carriers can in fact provide "reasonably adequate service".

The Commission finds no merit in these arguments.

Argument No. 1

ORDER NO. 5629 DOES NOT VIOLATE §§69-12-312 and 69-12-313, MCA.

7. At Order No. 5629, page 9, paragraph 31 this Commission states:

The Commission has considered the question of whether Class B and Class C Certificate applicants have a different burden of proof of public convenience and necessity. The Commission has determined that, in this case, there is no difference.

In its petition for reconsideration Matador argues that this statement "abolished the distinction of these two carriers as defined in 69-12-312 and 69-12-313" (Matador brief at 2). This is not correct.

8. This Commission, in Order No. 5629, continues to recognize the statutory differences between Class B and Class C carriers as set forth in §§69-12-312 and 313, MCA. The question in this docket was not whether there is a distinction between Class B and Class C carriers; the question was whether the distinction between the two classes justifies shifting the burden of proving public convenience and necessity from the applicant to the protestant in Class C applications. In Order No. 5629 this Commission determined that in this case there should be no change in the burden of proof. Matador did not meet its burden of proving that authorized carriers cannot meet the shipper's needs if given the opportunity to do so.

Argument No. 2

ORDER NO. 5629 DOES NOT CONCLUDE THAT IT IS SUFFICIENT FOR PROTESTING CARRIERS TO PROVIDE A "REASONABLY ADEQUATE SERVICE."

9. In its brief for reconsideration, Matador asserts that this Commission has determined that a protestant need only be able to provide "reasonably adequate service" and need not be able to meet the "distinct needs" of the carrier. This is not the finding of this Commission in Order No. 5629.

Findings of Fact Nos. 32 and 33 at page 10 of the order state:

To evaluate the need for a new authority the Commission must consider the services being provided by those carriers holding existing authorities. In this case it has not been established that a grant of new authority is needed to meet the additional public need. Testimony was introduced that Koch Asphalt did not contact the existing certified carriers. Koch Asphalt testified it preferred to use Matador because of Matador's ability to negotiate shipping price, evaluate credit and maintain confidentiality. Koch Asphalt has not established that the presently certified carriers could not provide these services.

. . .In this case Matador Service, Inc. has not established that the existing authorized carriers cannot meet Koch Asphalts need if given the opportunity to do so.

10. This Commission has determined that an applicant must establish that existing carriers cannot meet shipper needs. In this case, the shipper, Koch Asphalt, did not contact the existing carriers to determine if those carriers could meet the shippers distinct needs.

ORDER

MATADOR SERVICE INC.'S petition for reconsideration of Order No. 5629 is hereby denied.

DONE IN OPEN SESSION this 16th day of December, 1985 by a vote of 3 - 0 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Trenna Scoffield
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this matter. Judicial review may be obtained by filing a petition for review within thirty (30) days of the service of this order. Section 2-4-702, MCA.